

Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY

In the Matter of)
)
Examination of Current Policy)
Concerning the Treatment of) GC Docket No. 96-55
Confidential Information)
Submitted to the Commission)

**MEMORANDUM OPINION AND ORDER
ON RECONSIDERATION**

Adopted: September 28, 1999; Released: October 5, 1999

By the Commission:

1. The Commission has under consideration a petition for reconsideration filed by MCI Worldcom, Inc. (MCIW),¹ of our decision setting out our general policies governing the handling of confidential information.² MCIW seeks rule changes that would restrict the ability of a submitting party to seek confidential treatment of tariff cost support data and that would allow access to confidential information pursuant to a protective order while a denial of confidentiality was being appealed to the Commission. We deny MCIW's petition. In addition, we amend the rules to ensure that the General Accounting Office (GAO) has more efficient access to confidential materials, consistent with its statutory authority, and to make minor technical changes to the confidentiality portions of our Freedom of Information Act (FOIA) regulations.

2. **Treatment of Tariff Cost Support Data.** In our Report and Order we determined that, if a carrier seeks confidential treatment of tariff support information, it must either state that it will make the information available to all parties signing a nondisclosure agreement or file a request that the information be kept completely confidential.³ If a carrier requests complete confidentiality, and the Commission determines that public participation is

¹ Comments in this proceeding were previously filed by MCI Telecommunications Corporation, a wholly owned subsidiary of MCI Communications Corporation (MCI). MCIW is the successor to MCI.

² In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Report and Order, 13 FCC Rcd 24816 (1998) (Report and Order).

³ Report and Order at 24842.

necessary in order to determine the lawfulness of the tariff within the appropriate time frame, we stated that a streamlined tariff filing would likely be suspended. We also stated that we believed that full confidentiality would be granted only in the rarest of instances.⁴ On reconsideration, MCIW asks that we clarify the way requests for confidential treatment of tariff support data will be handled. MCIW contends that total nondisclosure of tariff cost support data violates due process and is arbitrary and capricious, especially when the standards for nondisclosure are not set forth in the rules.⁵ BellSouth Corporation (BellSouth) opposes MCIW's petition for reconsideration.⁶

3. MCIW's comments are largely repetitive of those presented in its comments in this proceeding and in its petition for reconsideration in the Tariff Streamlining proceeding,⁷ and we deny its petition. As we explained in our Report and Order, even if tariff cost support data is shown by a preponderance of the evidence to warrant confidential treatment, it will normally be released to interested parties pursuant to a protective order, thus affording interested parties the opportunity to participate effectively in tariff proceedings.⁸ MCIW complains that our order nevertheless envisioned instances where total nondisclosure of tariff cost support data might be allowed.⁹ But as we explained, we envision that total nondisclosure "would be granted only in the rarest of instances."¹⁰ Moreover, we noted that in instances where total nondisclosure is sought, the tariff is "likely to be suspended if the Commission is unable to determine the lawfulness of the tariff within the appropriate time frame without public participation."¹¹ We believe the prospect of suspension of a tariff is likely to deter carriers from making frivolous requests for total nondisclosure of underlying cost data. At the same time, since the lawfulness of a tariff may be clear to the Commission even without public comment on the cost support data, we do not believe we should automatically suspend a tariff that requests complete confidentiality. Moreover, if any of

⁴ Id.

⁵ MCIW Pet. for Recon. at 2-9.

⁶ BellSouth was one of the "Joint Parties" filing comments in this proceeding.

⁷ MCI Comments (June 14, 1996) at 11-19; MCI Reply Comments (July 15, 1996) at 8-9; MCI Petition for Reconsideration in CC Docket No. 96-187 (Mar. 10, 1997) at 15-18 (seeking reconsideration of In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, 12 FCC Rcd 2170 (1997) (Tariff Streamlining)).

⁸ Report and Order at 24841-42.

⁹ MCIW Pet. for Recon. at 4.

¹⁰ Report and Order at 24842.

¹¹ Id.

MCIW's concerns should come to pass in a specific case, we will have ample opportunity to weigh MCIW's concerns in the context of concrete factual circumstances. We therefore deny MCIW's petition for reconsideration in this regard.

4. **Confidentiality/FOIA Procedures.** MCIW argues that the provisions of our rules providing that materials will remain confidential pending consideration of an application for review result in "the de facto denial of applications filed by parties requesting disclosure" because of delays in ruling on the applications for review.¹² It therefore seeks disclosure of materials under a protective order while applications for review are pending.¹³ Although we agree that disclosure may be delayed pending the appeals process, we also agree with BellSouth that disclosure pending review would effectively moot any applications for review because it would place the assertedly confidential information in the hands of all parties signing the protective order without first granting the objecting party the opportunity to seek Commission or judicial review of the disclosure decision.¹⁴ We therefore deny MCIW's petition for reconsideration.

5. **Disclosure to the GAO.** Section 0.442 of our Rules,¹⁵ along with 44 U.S.C. § 3510, governs disclosure of records to other federal government agencies (but not to Congress, see 47 C.F.R. § 0.442(e)). Section 0.442 currently provides that information submitted to the Commission in confidence will be disclosed to other federal agencies as long as the Commission has not given specific assurances against such disclosure, the requesting agency has established a legitimate need for the information, the confidentiality of the information will be maintained by the requesting agency, and disclosure is not prohibited by the Privacy Act or other law. 47 C.F.R. § 0.442(b). A party who submits confidential information to the Commission is notified at the time the records are requested by another federal agency and may oppose the requests. No notice is provided, however, if notice will unduly interfere with law enforcement activities, in which case notice is provided once the potential for interference is eliminated. 47 C.F.R. § 0.442(d)(1), (2). If the party who submitted the confidential information does not object, the information is provided to the requesting federal agency. 47 C.F.R. § 0.442(d)(3). If disclosure is opposed, and the Commission decides to provide the information to the requesting agency, the submitting party is afforded 10 working days to seek a judicial stay. 47 C.F.R. § 0.442(d)(4).

¹² MCIW Pet. for Recon. at 18.

¹³ Id. at 20.

¹⁴ BellSouth Reply at 3.

¹⁵ 47 C.F.R. § 0.442.

6. Recently, the Commission has received numerous requests for documents from GAO. The 10 day notice procedures of section 0.442 have resulted in unnecessary delay when GAO requests information that is deemed confidential by the submitting party. We do not believe this notice period is necessary, as GAO is required under its own statute, 31 U.S.C. § 716(e),¹⁶ to maintain the confidentiality of confidential information that it obtains from the Commission. Moreover, the Commission is obligated by law to allow GAO access to its records.¹⁷ Given GAO's undisputed statutory authority, in our experience the 10 day period has merely resulted in delaying GAO's ability to gain access to requested information. We will therefore amend section 0.442(e) to provide that the advance notification requirement does not apply to requests from the GAO, although we will continue to provide notice that GAO has been afforded access to the documents.¹⁸ We find good cause that this rule change may be made without notice and comment because it is more consistent with Congress' clear intent that GAO be afforded unimpeded access to Commission records, and thereby better serves the public interest. See 5 U.S.C. § 553(b)(B). For the same reason, we will make this change effective upon publication in the Federal Register. See 5 U.S.C. § 553(d)(3).

7. **Technical Amendments to the Rules.** We take this opportunity to make several minor procedural amendments to our confidentiality regulations. Section 0.459(g) will be modified to clarify that documents will not be disclosed until the Commission disposes of any application for review of the order denying confidentiality and, if a judicial stay of that order is sought, until the court disposes of the motion for stay. This is consistent with our current practice.¹⁹ In addition, in the Report and Order we indicated that we would amend section 0.459 to permit third party owners of materials subject to confidentiality disputes to participate in the proceeding resolving the confidentiality issue, but by oversight section 0.459 was not so amended.²⁰ Section 0.459 will be amended accordingly and corresponding changes will be made to section 0.461. We also believe that the rules should be amended to make clear that if a response in opposition to a confidentiality request is filed,

¹⁶ That statute provides, "The Comptroller General shall maintain the same level of confidentiality for a record made available under this section as is required by the head of the agency from which it is obtained. Officers and employees of the General Accounting Office are subject to the same statutory penalties for unauthorized disclosure or use as officers or employees of the agency."

¹⁷ See 31 U.S.C. § 716(a) ("Each agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency. The Comptroller General may inspect an agency record to get the information.").

¹⁸ We will issue a Public Notice when a large number of parties must be notified that the GAO has been given access under section 0.442(e).

¹⁹ Report and Order at 24856-57; Tariff Streamlining at 2212-13 n.232.

²⁰ Report and Order, 13 FCC Rcd at 24856.

the party requesting confidentiality should be able to reply. Section 0.459 will be amended to so provide. We will also correct the citation to the Paperwork Reduction Act (PRA) in 47 C.F.R. § 0.442(a) and (b), because the confidentiality section of the PRA was recodified as 44 U.S.C. § 3510(b). These modifications are either nonsubstantive rule changes or procedural rules that do not require notice and comment under the Administrative Procedure Act, 5 U.S.C. § 553(b)(A) (rules of agency procedure do not require notice and comment).²¹ For the same reason, we will make this change effective upon publication in the Federal Register. See 5 U.S.C. § 553(d).

Ordering Paragraphs

8. IT IS ORDERED that MCIW's petition for reconsideration is DENIED.

9. IT IS FURTHER ORDERED that, pursuant to sections 4(i), 4(j), 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 403, Part 0 of the Commission's rules IS AMENDED as set forth in Appendix B, effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

²¹ See Aluminum Co. of America v. FTC, 589 F. Supp. 169, 178 (S.D.N.Y. 1984) (holding FOIA rules are procedural rules); see also JEM Broadcasting Co., Inc. v. FCC, 22 F.3d 320, 326-28 (D.C. Cir. 1994) (rules of agency procedure are exempt from general notice and comment requirements of the APA).

APPENDIX
(Changes in Bold)

Part 0 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 0 -- COMMISSION ORGANIZATION

1. The authority citation for Part 0 continues to read as follows:

AUTHORITY: Sec 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.442 is amended by revising paragraphs (a) and (b) by replacing "3508(a)" with "3510(b)," by revising paragraph (d)(1) and (e), and by creating a new subparagraph (d)(3) as follows:

§ 0.442 Disclosure to other Federal government agencies of information submitted to the Commission in confidence.

* * * * *

(d)(1) Except as provided in **paragraphs (d)(2) and (d)(3)** of this section, a party who furnished records to the Commission in confidence will be notified at the time that the request for disclosure is submitted and will be afforded 10 days in which to oppose disclosure.

* * * * *

(d)(3) A party who furnished records to the Commission in confidence under **section 0.457(d) or 0.459** will not be afforded prior notice when the disclosure is made to the Comptroller General. Such a party will instead be notified of disclosure of the records to the Comptroller General either individually or by public notice.

* * * * *

(e) **Except as provided in paragraph (d)(3), nothing in this section is intended to govern disclosure of information to Congress or the Comptroller General.**

3. Section 0.459 is amended by adding a sentence to the end of paragraph (d)(1), by adding a sentence to the end of paragraph (g), and by creating a new paragraph (i) as follows:

§ 0.459 Requests that materials or information submitted to the Commission be withheld from public inspection.

* * * * *

(d)(1) * * * If a response in opposition to a confidentiality request is filed, the party requesting confidentiality may file a reply.

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(g) * * * Materials will be accorded confidential treatment, as provided in § 0.459(g) and § 0.461, until the Commission acts on any timely applications for review of an order denying a request for confidentiality, and until a court acts on any timely motion for stay of such an order denying confidential treatment.

* * * * *

(i) Third party owners of materials submitted to the Commission by another party may participate in the proceeding resolving the confidentiality of the materials.

4. Section 0.461 is amended by revising paragraph (i) as follows:

§ 0.461. Requests for inspection of materials not routinely available for public inspection.

* * * * *

(i)(1) If a request for inspection of records submitted to the Commission in confidence under § 0.457(d) or § 0.459 is granted, an application for review of the action may be filed by the person who submitted the records to the Commission or by a **third party owner of the records**. The application for review and the envelope containing it (if any) shall be captioned "Review of Freedom of Information Action." The application for review shall be filed within 10 working days after the date of the written ruling, shall be delivered or mailed to the General Counsel, and shall be served on the person who filed the request for inspection of records. The first day to be counted in computing the time period for filing the application for review is the day after the date of the written ruling. If an application for review is not filed within this period, the records will be produced for inspection. The person who filed the request for inspection of records may respond to the application for review within 10 working days after it is filed.

(2) If the request for inspection of records submitted to the Commission in confidence under § 0.457(d) or § 0.459 is partially granted and partially denied, the person who submitted the records to the Commission, **a third party owner of the records** and the person who filed the request for inspection of those records may file an application for review within the 10 working days after the date of the written ruling. The application for review and the envelope containing it (if any) shall be captioned "REVIEW OF FREEDOM OF INFORMATION ACTION." The application for review shall be delivered or mailed to the General Counsel. If either person files an application for review, it shall be served upon the other person.

(3) If **an** application for review is denied, the person **filing the application for review** will be notified in writing and advised of their rights.

(4) If an application for review filed by the person who submitted the records to the Commission **or who owns the records** is denied, or if the records are made available on review which were not initially made available, the person who submitted the records to the Commission **or who owns the records** will be afforded 10 working days from the date of the written ruling in which to move for a judicial stay of the Commission's action. The first day to be counted in computing the time period for seeking a judicial stay is the day after the date of the written ruling. If a motion for stay is not made within this period, the record will be produced for inspection.

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